Neutral Citation Number: [2021] EWCA Crim 1944

Case No: 202003109 B2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 17 December 2021

Before :

LORD JUSTICE POPPLEWELL
MRS JUSTICE CUTTS
and
HIS HONOUR JUDGE BLAIR QC,
The Honorary Recorder of Bristol

- -

Between :

R E G I N A

Respondent

- v -

BQC

Appellant

- -
- -

Sarah Elliott QC and Farrhat Arshad (instructed by OBW Perera Ltd) appeared on behalf of the **Appellant**
Mark Fenhalls QC appeared on behalf of the **Crown Prosecution Service**

Hearing date : 26 November 2021

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Approved Judgment

Lord Justice Popplewell :

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

2. The appellant appeals against his conviction on 12 November 2020, in the Crown Court at Chelmsford before Her Honour Judge Lynch QC and a jury, on 26 counts of sexual abuse of four different complainants over a period of some 13 years. One was his step daughter (C1), two were his biological daughters (C2 and C3) and the fourth was a friend of the step-daughter (C4). The allegations were that the abuse occurred between 2006 and 2019 when the appellant was aged between 24 and 37 and when the girls were variously aged between 2 and 15. At the conclusion of the hearing we announced our decision that the appeal would be allowed and the convictions quashed on all counts. These are our reasons.

The alleged abuse

3. On 6 September 2019, C1, then aged 15 left the family home and said to her friend C4, also aged 15, that the appellant had been sexually abusing her. The police were contacted the following day and the appellant was arrested. Following C1's disclosure to her friend, C4 told her mother that the appellant had sexually assaulted her. During the investigation into C1's allegations, in October 2019, the appellant's two biological daughters, C2 and C3, then aged 13 and 11, each alleged that they had also been sexually abused by the appellant.

4. C1, C2, C3 and C4 all gave evidence. The sexual abuse against C1 was said to have taken place between July 2006 and September 2019, when she was aged between 2 and 15 years old. The sexual abuse which C1 alleged included anal rape (Count 1, aged 2-4), inciting sexual activity in return for a cookie (Count 2, aged 4), asking if she wanted to have sex with him (Count 3, aged 7), touching her breasts and vagina (Count 4, aged 5-7), masturbating in front of her (Count 5, aged 8 or 9), digital penetration of her vagina (Counts 6 & 7, aged 9-12 and 13-14 respectively), oral penetration of her vagina (Counts 8 & 9, aged 9-12 and 13-14 respectively), vaginal rape (Counts 10 – 13, aged 13-14) and sexually touching her (Count 14, aged 15). A number of these were multiple counts.

5. The sexual abuse of C2 was said to have taken place between May 2012 and September 2019, when she was aged between 5 and 13 years old. She alleged that the sexual abuse occurred in the family home and involved anal rape (Counts 15 & 17, aged 5-6 and 13 respectively), vaginal assault by penetration (Count 16, aged 12), anal assault by penetration (Count 19, aged 13), and vaginal rape (Count 18, aged 13).

6. The sexual abuse of C3 was said to have taken place between September 2017 and September 2019, when she was aged between 8 and 10 years old. The allegation was of five occasions on which the appellant touched her vagina.

7. The abuse of C4 was said to have taken place on two occasions, between March and September 2019, when she was 15 years old. She alleged that the incidents occurred when she had been staying at C1's house whilst she was off school; the first incident being in March 2019, when she woke up to find the appellant touching her vagina over her clothing (Count 20); the second occasion being when the appellant touched her bottom when giving her a hug (Count 21).

8. The Defence case was that the appellant did not sexually abuse any of the complainants and the allegations were fabricated. In particular, C1 was motivated to lie due to an argument with the appellant regarding her mobile phone and his attempts to control her.

9. The appellant gave evidence. He described the difficulties between him and C1 in relation to her behaviour, mostly to do with her mobile phone usage, and said that C1 was making up her account in order to get rid of him, due to the harsh rules he imposed over use of her mobile phone. He had no idea why C2 and C3 were making it up. He denied sexually touching C4 and said that if there was any touching, it was accidental.

10. The four grounds of appeal are as follows.

    (1) The judge failed to provide her directions of law to the jury in writing, or in draft form to counsel for discussion in advance. The directions were given orally over a period of two and a half hours, and then some were reiterated in different terms and at different stages including during the summary of the evidence. As a result a number of the important and complex legal directions necessary in the case, including those on cross-admissibility, hearsay, good character and bad character were given in a way which would have confused the jury and made them very difficult for the jury to follow or apply. Even if counsel had been able properly to consider those directions in advance, and even if there had not been errors within them, no jury could properly have absorbed and applied them in the course of their deliberations without receiving them in writing.

    (2) There were misdirections in relation to:

        (a) cross admissibility;

        (b) evidence from TM, C1's grandmother, of a complaint of sexual abuse by the appellant made to her by C1 when C1 was about 3 years old;

        (c) the appellant's good character, and the effect on it of evidence that the appellant had sexually abused a fifth victim, his niece (BP), for which he had been tried and acquitted in 2015, such evidence having been admitted as bad character evidence under s. 101(d) Criminal Justice Act 2003;

        (d) the topic of recent and first complaint.

    (3) The hearsay evidence of TM was wrongly admitted.

    (4) The evidence of the allegations of abuse by BP was wrongly admitted as bad character evidence.

The course of the proceedings before the summing up

11. The prosecution made a bad character application in writing in respect of the allegations of abuse by the appellant's niece, BP. These allegations, for which the appellant was tried and acquitted in 2015, were of vaginal rapes and oral penetration of BP when she was aged between 8 and 12 taking place in the bedroom at her grandmother's house, at which the appellant was intermittently living over that period. The prosecution made available to the defence the relevant material from the investigation and proceedings, and agreed that the fact of the acquittal should be put before the jury. The application was opposed by the defence on the grounds that the allegations were not capable of establishing propensity; and that in any event admission of the material would be unfairly prejudicial and would lead to satellite litigation.

12. The application first came before the trial judge at a preliminary hearing some months before the trial, so that orderly preparations could be made were its admission in evidence to be allowed. The transcript of her ruling is not easy to follow in places, not through any fault of hers but because substantial parts are marked "inaudible", perhaps as a result of it taking place remotely. It is sufficiently clear, however, that she expressed a firm conclusion that the evidence was capable of establishing a propensity for sexual abuse of young girls in a family setting; and it would not be unfair to admit the evidence. She held that the evidence was prima facie admissible, but did not rule definitively on its admissibility at that stage, saying that the matter would need to be revisited after the prosecution evidence, at which point it would be apparent, for example, whether it was being used to bolster a weak case.

13. The issue was revisited on 2 November 2020 after the prosecution evidence from the four complainants had been completed. The judge confirmed her decision that the evidence was admissible. BP gave evidence and was cross examined. The fact of the acquittal and other relevant facts formed part of the agreed facts.

14. On the same day as the bad character ruling, 2 November 2020, the judge also determined an application in relation to the admission of TM's evidence of a complaint made by C1 when C1 had been living with her for a few months when aged 3. Two statements from TM had been served. Ultimately the application was only to adduce part of her evidence which was to the effect that she recalled an incident when C1 was living with her and being bathed, which amounted in substance to C1 indicating that her daddy had told her to touch his penis; that TM had rung C1's mother and told her what C1 had said; and that no more was mentioned of it again.

15. The application was advanced in reliance on s. 120 of the Criminal Justice Act 2013, subsection (2) of which provides:

> "(2) If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible."

16. On behalf of the defence Ms Elliott QC submitted that on the basis of the authorities which she cited, the evidence would have to be rationally capable of answering an allegation of fabrication, and that it could not do so for one or both of two reasons. The first was that the conduct about which TM said that C1 complained to her differed from what C1 was alleging the appellant had done to her at that age. Only the Count 1 and 2 allegations could have occurred by the stage of the alleged complaint to TM. The

Count 1 allegation was of anal rape, and count 2 that he asked her to "sit on his dick" in return for a cookie. If TM's evidence were true the complaint was not of conduct of which the appellant was accused. Secondly, it was not C1's evidence that she had complained at the time, nor even that she might have done so but could not remember. Her evidence was that she had a reasonably good memory of what had happened even at that young age, and that she had not complained about it at the time because the appellant had told her that if she did the family would be broken up and she would lose her family. Ms Elliot further argued that admission of the evidence as hearsay would be unfair because it could not effectively be challenged.

17. In ruling the evidence admissible the judge made clear that she was doing so on the basis that it was to rebut the defence case of recent fabrication. She said that she did not think it here or there that the allegation was of different conduct: it was an allegation of sexual abuse at an early stage which was spontaneous, and that was in her view sufficient.

18. On the morning of 9 November 2020, with the appellant's evidence due to finish shortly and as the close of the defence case approached, Ms Elliott sent the judge an email inquiring whether she would be providing her directions in law in writing. In court that morning, after the completion of the appellant's evidence, and in the absence of the jury, Ms Elliott again raised the question. The judge said that she did not intend to do so, because "I don't give jurors directions of law in writing". When Ms Elliott inquired whether counsel could be provided with a written copy of what the judge intended to say, the judge declined, saying that the directions she would be giving would be "classic directions in accordance with directions as they've been given since time immemorial". Ms Elliott drew attention to the fact that the Crown Court Compendium recommended that judges should give directions in writing in a case of this sort, and that there were some aspects of the directions which were not straightforward, including cross-admissibility, propensity, bad character and the status of the previous acquittal. She said she would welcome seeing what the judge proposed to say in writing. The judge responded that she would not be giving the jury or counsel written directions because they were "classic straightforward directions".

19. The judge had provided to counsel a draft route to verdict in writing. There followed discussion of this draft, resulting in amendments to it as a result of assistance from both prosecution and defence counsel. This route to verdict was in due course provided to the jury as a written document.

20. The judge then said she would "whistle through" what she was going to say on the law and would stop at the ones on which she thought she would like counsel's input "particularly the prosecution, but this is just so everyone knows where I'm going". When she got to "recent complaint" she said she was pausing to hear counsel's observations as to whether "grandma's evidence" should be dealt with as part and parcel of recent complaint or part and parcel of bad character, opining that she would be inclined to treat it as the latter and "so it would be tied up in the propensity bad character application." Mr Fenhalls QC for the prosecution submitted it was both. Ms Elliott submitted that it was not bad character, did not fulfil the requirements of recent complaint as the complainant did not remember making the complaint and had been admitted as rebuttal of recent fabrication. She submitted that there would have to be a hearsay direction, with the full caveats about the reliability of such evidence both generally and by reference to specific arguments as to the unreliability of TM's account

on the evidence in the case. The judge said she thought it was bad character combined with hearsay, but she did not identify the terms of any direction which she would give in consequence of that conclusion.

21. The judge next raised cross-admissibility. As is well known from the leading case of *R v Freeman* [2008] EWCA 1863, [2009] 1 Cr App R 11, and reaffirmed more recently in this court in *R v Adams* [2019] EWCA Crim 1383 and *R v Gabbai* [2019] EWCA Crim 2278, [2020] 4 WLR 65, there are two main ways in which evidence of an offence charged on one count may be admissible in support of the allegation of an offence charged on another count. One is that that if the jury are sure that the conduct charged on one count took place, they may treat that conduct as showing a propensity to commit a particular type of offence or to behave in a particular way, so as to provide support for a conclusion of guilt on another count. That may apply to different counts relating to a single complainant, as well as to those involving different complainants. The other way in which evidence of one offence may be cross admissible in support of another arises where there is more than one complainant. In such a case it may rebut coincidence because of the unlikelihood that separate and independent complainants would have made similar but untrue allegations against the defendant. Sometimes the evidence may be cross-admissible on both bases. If cross-admissible on either basis, the evidence is bad character evidence within the meaning of section 98 of the Criminal Justice Act 2003 and requires an application by the Crown in accordance with the Criminal Procedure Rules for it to be admitted as such under s. 101 of the Act.

22. The judge and counsel clearly had these well-known principles in mind. The prosecution had previously served a bad character application seeking to rely on cross-admissibility for both purposes. However in the discussion which followed the judge raising the subject of her direction on cross-admissibility, she indicated that she intended to give a direction that it was relevant to propensity. There was no indication at that stage that the judge would direct the jury that the account of the five different complainants (including BP) could rebut coincidence, and prosecution counsel did not invite her to do so. Ms Elliot has submitted to us that she was not surprised at the time by the indication that propensity was the only basis on which cross-admissibility would be left to the jury, not least because during the course of the evidence she had laid the foundation for suggesting that these family members were not independent in their complaints and that the possibility of contamination or collusion was a very real one.

23. Towards the conclusion of the discussion on directions, Ms Elliott returned to the question of TM's evidence, and reiterated that it was something she would like to come back to because she was concerned about the tension between it having been admitted as evidence to rebut fabrication and the bad character direction. With conspicuous tact and delicacy, she again urged the judge to produce directions of law for the jury in writing, even if only on what she described as the most troublesome topics of hearsay and bad character. She said that although there had been some discussion in the abstract of what the judge would do, it was difficult to make submissions without seeing a draft in writing. The judge declined the request.

24. Ms Elliott submitted to us that that the approach taken by the judge made it very difficult for her to respond "off the cuff" and very difficult to predict exactly what the judge was going to say in her directions of law. We see considerable force in that submission.

The summing up

10 November morning

25. Counsel's speeches were given on the afternoon of 9 November, following the discussion we have described, and the judge commenced her summing up the following morning, 10 November. She did so without providing anything in writing for the jury save for the route to verdict. She gave the initial direction that the jury were to take the law from her but the facts were for them. When taking the jury through the law on the ingredients of the offences she said she thought the law would not trouble them much "so far as this is concerned" because the Crown relied on the girls' evidence of what happened, and the appellant asserted he had not committed any of the sexual abuse alleged.

10 November morning break

26. When the jury had a break at about midday, Ms Elliott returned to the question of the appropriate direction in relation to TM's evidence, which was not something the judge had yet dealt with. An email had been sent to the judge by Ms Elliott's team the previous evening expressing the view that it should be dealt with by a hearsay direction in accordance with that recommended in the Compendium for cases where evidence was admitted under s. 120(2) of the 2003 Act to rebut recent fabrication, with a suitable adaptation to reflect the fact that it was not the paradigm case of a previous consistent statement of the witness herself, but a statement from a third party, TM. A draft was provided. It was not, Ms Elliot submitted, bad character evidence because if admissible to rebut recent fabrication it must be to do with the facts of the case within the meaning of s. 98 of the 2003 Act. Ms Elliott reiterated to the judge that she did not know what the judge was proposing to say about it. The judge's response was "Thank you." As will be seen, the judge did not adopt the approach Ms Elliott suggested in her direction about TM's evidence.

10 November morning resumption

27. The judge addressed the jury after the break on what she signposted as directions as to the jury's approach to the evidence. There is then a passage which runs over 7 pages of transcript, lasting some half an hour, which contains directions on cross-admissibility between counts, propensity, contamination/collusion, coincidence, hearsay, the evidence of BP, the evidence of TM, and "supporting" and "indirect" evidence For the most part it has no headings or signposting to assist the jury on which of these topics is being addressed at any time. It does not follow any obvious structure and does not follow the specimen directions in the Compendium in either form or substance. In the light of the issues raised in this appeal we must refer to it in some detail.

28. The judge first explained that although the jury must consider each count separately, in some circumstances evidence on one count is capable of supporting another count. She said that this was what was meant "in the trade" as cross-admissibility. She said it was vital that the jury keep the counts separate but "there are two stages here to consider". She then referred to the fact that the girls complained of various incidents of sexual abuse over time and said:

> "Quite often when you hear phrases like the defendant has a tendency to commit offences of the kind [with] which he is charged, that doesn't mean a tendency to be a rapist or a tendency to be a sexual assaulter it means a tendency to commit sexual

offences against a particular group of people. Do you follow? So don't get too tied up with specifics as far as that is concerned."

29. We doubt whether the jury would have found this easy to follow. Indeed we are not sure we do. It may be that the judge had in mind that the two "stages" she was going to address in relation to cross-admissibility were the two ways in which evidence on one count might be supportive of another count, namely propensity and coincidence; that propensity meant a tendency to commit offences or engage in conduct of a particular character; and that for that purpose the conduct need not be any more similar than that it was a tendency to commit sexual offences generally against a particular group of people. But if so, it was not expressed in terms which would have made that apparent to the jury. The "two stages" were not identified for the jury.

30. The judge next reminded the jury that the appellant said that no sexual abuse had taken place and that the prosecution said there were similarities in his behaviour towards each complainant in that each of them was a family member and a child who was complaining of sexual assault. The jury might have thought, if they were following this at all, that this was a further illustration of the point that propensity need not be any more specific than that. However the next sentence from the judge was: "And the Crown suggests that it is no coincidence that the fact that these four girls have made similar but otherwise unconnected complaints about [BQC]'s behaviour makes it more likely, say the Crown, that these complaints are true in the sense that each of them are capable of lending support to the others."

31. This introduced the concept of cross-admissibility being used for the purpose of rebutting coincidence. However the judge did not at this stage refer to the defence argument and evidence supporting contamination and/or collusion which would be necessary to balance the Crown's contention. Instead she moved to saying that there was a distinction between supporting evidence and direct evidence, a theme which she used as a structure for the way she dealt with her further directions. She said that the complainant's evidence was direct evidence, but there was other indirect evidence which was capable of supporting the prosecution case and was important if accepted. She gave as an example the evidence from BP as going to show a propensity. She moved straight to a second example of indirect evidence as being that of "grandma" (ie TM). The judge said that the evidence of the complaint by C1 to grandma when she was three had been called for a very specific purpose of rebutting the suggestion made by the defence that the child had made no complaint about any of the assaults against her. The judge went on: "The Crown have called grandma, who's told you or given her account of a complaint that was made at a very early stage to show that she did complain. She doesn't remember it, but she did." This was not a full summary of C1's evidence. She had not said that she could not remember whether she had complained. Her evidence was that she had a good recollection of events even at that very early age, and that she had not made any contemporaneous complaint because the appellant had told her not to.

32. The judge then said that supporting evidence was only capable of supporting the prosecution case if the jury accepted it as true, and thought it appropriate, and that they should not convict wholly or mostly on it.

33. Then the judge said she was going back to cross-admissibility. She said "The way that works is as I've said to you the Crown say that its no coincidence that the girls have

made similar but otherwise unconnected complaints." So at this stage she appeared to be telling the jury that the relevance of cross-admissibility was to rebut coincidence. At this stage she said that the jury should be cautious and must first ask themselves whether the complainants were independent of each other, or might have been influenced by another to make the complaints, deliberately or subconsciously. She then referred to Ms Elliot's submission that they could not be sure that there had not been deliberate or unconscious contamination and made a reference to one particular aspect of the evidence relied on by the defence in support of that submission. There were, however, a number of other aspects of the evidence on which Ms Elliott had relied in her speech in support of contamination/collusion. The judge did not purport to summarise the defence evidence or case on that topic, merely referring to one of the many points made. She concluded by saying that that they might treat the evidence of one complainant as supportive of that of another if they were sure they could exclude any realistic possibility of influence, conscious or unconscious. She continued "So in this situation you would consider the evidence of [C1] first. If you were sure that one or any of the [C1] counts had been proven so that you were sure, when you moved on to consider the case against [C2] your finding of guilt against [C1] can be evidence which is supportive of the prosecution case as afar as [C2] is concerned. Do you follow? And moving on to [C4] if you are sure as far as the other girls are concerned, then your finding on those girls is capable of being supportive of the evidence as far as [C4] is concerned and [C3] and so on through the indictment. That is how they are capable of supporting the girls in between them." This made no clear distinction between use as propensity evidence and use to rebut coincidence. Further confusion may have been caused by the fact that the judge went on "Propensity is also something else which arises in relation to cross-admissibility if you like in relation to the girls." This was heralded as a new aspect of cross-admissibility, yet it had been part of what she had previously been explaining.

34. Then the judge said. "As I've said, the Crown rely upon the evidence that you've heard to establish propensity. Let us look, if we may, at [BP] and her evidence." She went on that the jury had heard her evidence "for a very specific purpose" which the judge explained was to establish propensity. She then gave some of the standard directions designed to safeguard defendants from the improper use of bad character evidence and reminded the jury of what the Crown and the defence said about it. In the course of doing so she said: "And the Crown submits that if [BQC] does have such a propensity to act then it is more than mere coincidence that he has done so on further occasions in relation to his own children. Do you follow?" This was a conflation of the propensity and rebutting coincidence aspects of cross-admissibility, mentioned in passing when dealing with BP's evidence as relevant to propensity.

35. The judge said in this passage of the directions: "The fact that he has previously stood trial for similar offences cannot itself prove his guilt on this indictment and you should not convict him just because or mainly because of it, remember he was acquitted." This was unsatisfactory in its reference to standing trial and the acquittal. There was no clear direction that even if the jury were sure of the allegations made by BP, they could not convict on the indictment offences wholly or mainly because of that conclusion.

36. The judge then came back to the evidence of TM as supporting evidence. She summarised the evidence TM had given in a little detail, and adverted to the inconsistencies in her evidence which had been put in cross examination. She went on

to explain that the evidence had been called for the very specific purpose of rebutting the suggestion made to C1 in her in cross-examination that she had not complained of the assaults before she was 15 and that the Crown had called grandma's evidence to establish that she had. The judge went on to say that the interesting part of it was that C1 herself didn't remember making that complaint and the judge reminded the jury of C1's evidence that she had agreed in cross-examination that she had not made any complaint and that it was because the appellant had told her that if she told anyone the family would be split up and she'd lose the family. The judge said again that the evidence was called for the very specific purpose of rebutting the suggestion that C1 never made a complaint before. The judge then referred again to the conflicting evidence of C1 and TM as to whether a complaint had been made and continued: "the reason you heard about the statement is to help you decide whether [C1] has made up what she said in the witness box or whether its true. But what she said in her statement and what she said in the witness box is evidence for you to consider when you are deciding whether she has been consistent in what she has said about the incidents or whether or not she has not complained, or does not remember complaining, shows that she has made it up." The judge said that they would have to decide whether grandma's statement was true because C1 had no recollection; and that so far as the inconsistencies are concerned they are within grandma's statement as opposed to C1's.

37. The judge next went on to what she described as "the final part of hearsay evidence" although it was the first time she had mentioned the word hearsay. Her direction related to some text messages between C1 and her mother after C1 left home. There was no reference in this context to TM's evidence.

10 November lunch break

38. After the jury had been sent away for the lunch break, Ms Elliott raised two points. The first was the that the judge had given a coincidence direction in relation to cross-admissibility but had only mentioned one of the features of the evidence relied upon by the defence in submitting that the witnesses were not independent. Ms Elliott invited the judge to adopt the format of the specimen direction in the Compendium so as to set out the specific matters relied on by the defence to suggest collusion and/or contamination such as to undermine the suggestion of the unlikelihood of coincidence. The second was that the judge was in error in saying in relation to TM's evidence that C1 had no recollection of making a complaint; she had positively asserted the contrary.

10 November afternoon

39. After the luncheon adjournment, the judge told the jury she would finish the legal directions that afternoon and resume in the morning with her summary of the evidence, but would come back to the law when doing so, including to "revisit some of those witnesses I said the cross-admissibility relates to in propensity. Do you follow?"

40. Having addressed recent complaint she went on to address the appellant's good character. She said:

> "You have heard that as far as [BQC] is concerned, he is a man with no previous convictions for any criminal offence and that in that sense he is a man of hitherto good character. However you have also heard that he stood trial in relation to the

> [BP] case in 2017 [in fact 2015] and was acquitted of the sexual offences in relation to his niece."

41. She then reminded the jury that she had given them a direction as to the use to which they could put BP's evidence, and went on:

> "….do not forget that apart from that previous trial he is a man, as your admissions tell you, without any previous convictions and generally that is something that you should take into account in his favour when you are considering the evidence he has given before you. But again I am going to come back to that when I deal with his evidence and deal with how you should approach considering good character because you take into account not only the fact that he has no previous convictions but everything else you know about him, his working life and family life and so on and so forth. All right. So we'll come back to that but don't forget good character aside from the trial we are dealing with."

42. Ms Elliott makes two criticisms of this direction. First it fails to give the second limb of the good character direction, namely that it should be taken into account in the defendant's favour as something which might make it less likely that he had committed the offences charged. Secondly that by twice coupling it with the trial for the allegations of BP, it was essentially weakened without the jury being made to understand that he was entitled to the benefit of his good character unless they were sure that the allegations of BP were true.

43. The judge then adjourned at about 1450, saying to the jury that she was going to return to the law but that it was better dealt with when she was dealing with the facts, which she would commence the following morning.

10 November after jury sent home

44. After the jury left court, Ms Elliott expressed concerns that the good character direction was inadequate in the respects we have just identified. The judge said she knew it was inadequate which was why she was going to come back to it. Ms Elliott again expressed her concern that the jury were not getting the help they needed as a result of the directions not being in writing, and suggested that it was not too late to do something about that. In the course of subsequent exchanges, the judge said that the old Bench Book was preferable to the Compendium on cross-admissibility, something she had already intimated during the discussion before speeches. Ms Elliott submitted that the Compendium identified that there was much more that needed to be said about the coincidence limb of the direction. The judge responded that she had looked at it and there wasn't.

11 November morning

45. The following morning, 11 November, the judge continued her summing up with her review of the evidence, saying she was moving on to the jury's territory, not hers. The morning was spent in a summary of evidence in the case.

11 November lunch break

46. When the Court broke for lunch, Ms Elliott again raised a number of concerns with the judge. She invited the judge to direct the jury in relation to the coincidence limb on cross-admissibility by reminding them of all the specific reasons why the defence contended there was the potential for contamination and/or collusion. She repeated her concerns in relation to the mixed good character direction, and the terms in which it had been coupled with a reference to the BP allegations, and in relation to what had been said about cross-admissibility. She again urged the judge to put her directions of law in writing, pointing out that a number of them were complex, that they had taken two hours to deliver orally, and submitting that they were difficult enough for the lawyers to follow but would go over the jury's head without an aide memoire to assist them. In the face of the judge's graceless and unfair remark that it was a pity that counsel had not assisted earlier if she wanted her to do it all from the Compendium, and her resolute repetition that she was not going to give directions in writing, Ms Elliott was suitably respectful and moderate when persisting in her continued attempts to persuade the judge to do so, explaining that she was not seeking to be unpleasant or difficult but was genuinely concerned about the adequacy of the summing up from the defendant's point of view. When the judge asked Mr Fenhalls whether the prosecution shared the view that the jury had not had an adequate summing up, he replied that he could not say yes to that at the moment because he would have to form a view when the summing up was completed. He did, however, encourage the judge to give the mixed good character direction in the format set out in the Compendium. He submitted that provided she dealt with the points made by Ms Elliott clearly and crisply at the end of her summing up, he would not join in the invitation to delay for the production of directions in writing.

47. In continuing the summary of the evidence in the afternoon, the judge returned to cross-admissibility. She said she had given them a cross-admissibility direction and reminded them that it was a matter of law not of the facts. She said she was going to remind them of how they could use cross-admissibility. She then gave a full direction, as if given for the first time, which followed the form and substance of the specimen direction in the Compendium, including a full summary of the points which the defence had raised on collusion or contamination as relevant to coincidence.

The Grounds

Ground 4

48. We find it convenient to deal first with Ground 4, which challenges the judge's decision to admit the evidence of BP's allegations. We cannot detect any error in the judge admitting this evidence. The evidence was of sexual abuse of a young female family member, which was clearly capable of establishing a tendency to commit such abuse so as to make it more likely that the appellant had sexually abused the other young female family members in the way alleged by the prosecution. It was relevant and admissible propensity evidence within s. 101(d) CJA 2003 and properly admissible in accordance with the guidance in *R v Hanson* [2005] 1 WLR 3169, [2015] 2 Cr App R. 21. The differences in the particular form of sexual abuse did not significantly detract from its probative value as propensity evidence.

Ground 3

49. We deal next with Ground 3, namely that the judge was wrong to admit the evidence of TM about C1's complaint to her.

50. The decisions of this Court in *R v Athwal* [2009] Cr App R 14 and *R v MH* [2012] EWCA Crim 2725 make clear that if a prior statement is to be admitted under s. 120(2) of the 2003 Act to rebut fabrication, its admissibility is governed by the hearsay provisions under s. 114 of the Act, not under the previous common law rules of admissibility. If so admitted, it becomes admissible as to its truth by reason of s. 120(2), not merely evidence of consistency in rebuttal of a suggestion of fabrication of the oral evidence given at trial. Accordingly the judgment as to whether such evidence should be admitted is subject to the considerations identified in s. 114(2), the application of s. 84 of the Police and Criminal Evidence Act 1984 by reason of s. 114(3), and is to be exercised with care. In *R v MH* the Court approved the dictum of Dixon J in the High Court of Australia in *Nominal defendants v Clements* [1961] 104 CLR at 479, addressed to evidence admissible in rebuttal of recent fabrication at common law, as equally applicable to its admission under the 2003 Act:

> "… In as much as the rule *[i.e. rebuttal of recent fabrication]* forms a definite exception to the general principle excluding statements made out of court and admits a possibly self-serving statement made by the witness, great care is called for in applying it. The judge at the trial must determine for himself upon the conduct of the trial before him whether a case for applying the rule of evidence has arisen and, must exercise care in assuring himself not only that the account given by the witness in his testimony is attacked on the ground of recent invention or reconstruction or that the foundation for such an attack has been laid- but also that the contents of the statement are in fact to the like effect as his account given in his evidence and that having regard to the time and circumstances in which it was made it rationally tends to answer the attack."

51. Ms Elliott advanced a number of points. First she emphasised that this is not a case of a third party giving evidence of a complaint which the maker could not remember making, but one which the maker gave positive evidence she did not make. In our view this is to give undue weight to C1's evidence that she could remember well the events which she was complaining had occurred when she was about 2 to 3 and her acceptance in cross examination that she had not made a complaint because of what the appellant said would be the consequences. Memories of events at such a young age are notoriously imperfect. She may have had a sufficient memory of the essence of the abuse she described, and of being told not to mention it, but been fallible in her memory as to whether she had in fact mentioned abuse to anyone at the time. The evidence of TM was not deprived of its potential value to rebut fabrication merely by virtue of C1's evidence that she had not mentioned it to anyone.

52. Ms Elliott's next point was that the evidence of TM was not rationally capable of answering the attack of fabrication because of the disparity in the nature of the abuse described. In Dixon J's words, the contents of the statement by C1 to TM were not "to like effect" as C1's account given in evidence. We are unable to accept that this renders the evidence of TM incapable of rebutting the attack which was being mounted by the defence on C1. The attack was that the reason for C1's allegations of abuse were to be

found in her teenage pique at the curbs which the appellant was placing on her mobile phone use. A complaint of sexual assault at the age of 3, even of a different nature from that which she recalled in the witness box, was logically capable of rebutting that suggestion by the defence: if there had been a complaint at a young age of sexual abuse by the appellant, it made it all the more unlikely that her evidence of other sexual abuse was a fabrication out of pique.

53. Ms Elliott also submitted that she could not fairly challenge the evidence if admitted. However she was able to cross-examine both C1 and TM. In the event TM's evidence departed significantly from that which was the subject matter of the admissibility ruling, but that is not a ground for impugning the admissibility ruling. The upshot was that Ms Elliott was able to make, and did make, a number of powerful points as to the unreliability of TM's account in her final speech, and they were, ultimately, included in the final direction the judge gave the jury.

54. We do not, therefore, think that the judge was wrong to rule the evidence of TM admissible. However, the fact that the consequence was that C1's statement became admissible as to the truth of its contents called for a careful direction in the particular circumstances of this case. We return to this point below when considering the direction given.

Ground 2

Ground 2(a): misdirection on cross-admissibility

55. Ms Elliott submitted that the stance taken during the initial discussions on cross-admissibility, which was to confine the direction to the propensity purpose, was the correct one, and that the judge erred in directing the jury that the evidence was cross-admissible to rebut coincidence. She argued that a direction on both limbs, propensity and coincidence, was overly complex and confusing, and supported her submission by arguing that there was powerful evidence of the opportunity for collusion or innocent contamination between family members such as to make it inappropriate to invite the jury to consider an argument of absence of coincidence.

56. In the Compendium, it is said that a direction may be appropriate in "some rare cases", echoing what was said in *R v N(H)* [2011] EWCA Crim 730 at [31]:

> "It will be in rare circumstances, if at all, that the jury might be directed to consider *both* these possibilities in the same case (although it is not so unusual for the jury to consider the effect of a relevant *previous conviction* as demonstrating a relevant propensity *and* the unlikelihood that similar but independent complaints are, as between themselves, coincidental or malicious). Whichever is the basis upon which the jury is directed that they may consider the evidence given in relation to one count as support for another, they will require careful directions as to their proper approach to the evidence and, in the case of an alleged propensity, a specific warning as to the limitations of such evidence."

57. The explanation given in the Compendium for the statement that the direction should only rarely be given on both limbs is that such a direction gives rise to the danger of double accounting, that is the danger of the jury using evidence on count 1 to rebut coincidence on count 2, and then having become sure of guilt on count 2 using that as propensity evidence to convict on count 1. The Compendium contains a draft direction on both limbs which seeks to address this danger by giving the propensity direction first.so as to make clear that the jury must, in the example given, be sure of guilt on count 1.

58. We do not consider that it was wrong in principle for a direction to be given on both limbs in this case. There were five complainants, including BP, and allegations of sexual abuse on numerous occasions. The evidence was of significant potential value to the jury in relation to both propensity and coincidence. The evidence of the potential for collusion or contamination upon which Ms Elliott relied to rebut independence was not of any particularly striking cogency and certainly not of such strength as to preclude any jury being sure that the complaints were independent. She emphasised that all the complainants were closely related and that C2, C3 and C4 made their complaints after they knew of C1's allegations. That is not, however, something which rules out independence. The jury might quite properly have concluded that the complaints were not tainted by collusion or innocent contamination between all the complainants, notwithstanding their connection and the fact that the complaints of C2, C3 and C4 were made in knowledge of C1's. Moreover both prosecuting and defence counsel had addressed in their speeches the likelihood or unlikelihood of coincidence, such that the jury were entitled to some assistance on the relevance of these arguments.

59. However, the way the matter was left to the jury was very unsatisfactory. Because of the complexity of the topic, and the need to avoid the danger of double accounting, a clear, concise and well-tailored direction was essential. The judge's directions were the antithesis of what was required. The form of the direction was diffuse and confused, moving between propensity, coincidence, bad character and supporting hearsay evidence. Concepts of propensity and rebuttal of coincidence were addressed in a muddled and imprecise way, over several different parts of the summing up, in terms which gave rise to a real danger of leaving the jury confused. Such confusion would not have been dispelled by the fact that in the end, and whilst dealing with the evidence, a full direction was given, because the judge did not at that stage ask the jury to ignore what she had previously said on the subject. There is a real danger that the jury would have treated it as an additional direction, not a substitute, without any indication of how they could reconcile it with what had gone before, which would simply have added to the confusion.

60. The judge's failings in this respect were made all the more serious by her failure to provide a written direction, which would have identified exactly what the jury could do with the evidence on one count in relation to another and serve as an aide-memoire during their deliberations on this complex topic. We doubt whether trained lawyers would have found it easy to assimilate and retain what the judge said orally about the purpose to which cross admissibility could be put, let alone lay jurors, without a clear written document to assist.

Ground 2(b): misdirection on good character

61. The way in which the judge initially gave the good character direction was seriously flawed in two ways. First it omitted the second limb. Secondly, it gave the impression that the benefit of good character to the defendant could be neutralised merely by the fact of BP having made the allegations which were the subject matter of the 2015 trial. It failed to make clear to the jury that the appellant was entitled to the full benefit of a good character direction, in both its limbs, unless the jury were sure that BP's allegations were true.

62. This was not remedied by the fuller direction given later in the course of the summing up on the evidence, for two reasons. First the later direction was not heralded as a substitute for what had gone before, so that the jury might have thought that they were just being told the same without being alerted to the fact that the first direction was deficient. Secondly, the further direction was itself deficient. It did not provide the warning regarding not convicting solely on bad character evidence; and it did not ensure that the jury should give the appellant the full benefit of his good character unless they were sure of the bad character allegations of BP.

63. In summary, the way in which the judge dealt with good/bad character overall gave rise to a real danger that the jury might be left thinking that the mere fact of BP having made the allegations which she made was sufficient to deprive the appellant of any ability to rely on good character.

64. Again, the lack of any written direction served to exacerbate this failing.

Ground 2(c): misdirection in relation to TM's evidence

65. There were, in our view, three serious flaws in the directions given as to how the jury should approach TM's evidence. First, it was addressed piecemeal at different stages of the summing up on the law in a confusing way, with this evidence being addressed together with other pieces of evidence under a structure of indirect or supporting evidence. Secondly, there was never a proper hearsay direction, explaining the dangers of the hearsay nature of the evidence, including, for example, that the jury had had no opportunity to observe C1 making the alleged complaint. Thirdly, and although the judge did emphasise that the evidence was relevant for the specific purpose of rebutting fabrication, the content of the alleged complaint gave rise to particular difficulties which were never addressed by the judge's directions. The abuse of which C1 allegedly complained to TM was different from that with which the appellant was charged, and of which C1 gave evidence. That had the consequence that a carefully tailored direction was necessary to explain how the complaint, if the jury accepted it had been made, was capable of rebutting the defence case of fabrication, in the way we have described above, which differs from the way evidence of contemporaneous complaint will often rebut a defence of recent fabrication where it is a complaint of the very conduct with which the accused is charged. Moreover, in the light of the fact that the jury had been given propensity directions in relation to BP's evidence, and cross-admissibility, there was a real danger of a juror reasoning that the abuse as allegedly reported to TM was further and additional abuse which had occurred over and above that charged in the indictment; and of using that as prejudice or propensity evidence in relation to the indictment offences. That indeed is implicit in the judge's own initial reaction that it was bad character evidence. We think that this danger should have been catered for by a specific warning to the jury that the evidence could not be used in this way.

66. In this respect, as with cross-admissibility and good/bad character, the failings in the judge's directions were exacerbated by the absence of a clear and concise written direction.

Ground 2(d): recent complaint

67. This ground focusses on criticisms of the judge's use of the expression "recent complaint". We can deal with it briefly in the light of our conclusions on the other issues in the appeal. It is sufficient to say that we do not think there is anything in this criticism which would have caused or contributed to the convictions being rendered unsafe.

Conclusion on Ground 2

68. In our view the combination of the flaws in the directions given to the jury, on cross-admissibility, good/bad character, and the evidence of TM, is such as to undermine the safety of the convictions.

Ground 1: no written directions

69. In the recent case of *R v Grant* [2021] EWCA Crim 1243, Lord Justice Fulford VP reviewed the jurisprudence on providing the jury with written directions. That review concluded that the cases strongly support judges providing the jury with written assistance and that it is now expected that judges will provide the directions of law, or at the very least a route to verdict, in all but the simplest of cases. The Court suggested that the Criminal Procedure Rules Committee might consider whether the essentially permissive approach in Criminal Procedure Rules and Practice Directions might be made more directive. We understand that the Criminal Procedure Rules Committee has indeed reconsidered the matter but the process has not yet been concluded so that we do not have the benefit of knowing the outcome.

70. Nevertheless, we have no doubt that this is a case which cried out for written directions of law, at least on the topics which we have addressed in this judgment. The directions were not, as the judge wrongly asserted, straightforward, as is amply demonstrated by the errors which she made. In a case such as this the provision of written directions serves at least four important purposes. First, the discipline for the judge in drafting such written directions will almost always assist clarity of thought and exposition. Secondly, it ensures that the directions are given once and in a clear and concise form, rather than being repeated in differing terms at varying stages of a summing up, which is apt to lead to imprecision and confusion. Thirdly, such directions can be provided in draft to counsel who will have an opportunity to study their exact language so as to be able to assist the judge with any changes which may need to be made before the directions are given to the jury. It is common for changes of this sort to be made prior to the summing up, on the suggestion of prosecuting or defence counsel, and not infrequently both, following constructive discussion. This is a valuable procedural opportunity to minimise the risk of error in this critical part of the judge's function, but can only serve that purpose if counsel are sufficiently informed in advance of what the judge is going to say. Fourthly, the document will enable the jury better to take in what the directions mean when they are listening to them being given orally in the summing up, and thereafter serve as a useful aide memoire for the jury including in retirement.

71. Their use is in these ways an important procedural tool in ensuring a fair and efficient trial in any but the most straightforward of cases. This case provides a good illustration of what can go wrong in the absence of such directions, even for experienced judges, as this judge was. It also illustrates how serious can be the consequences if a failure to use this simple tool undermines the safety of convictions, necessitating a retrial, which we have ordered. The additional burdens placed on the complainants, the defendant, the witnesses, and their families by such a course are severe, as so often in sexual offences cases, quite apart from the additional public time and money wasted and the additional pressures imposed on the court system.

72. In *R v Grant*, the court made clear at [47] that the absence of written directions does not of itself render a conviction unsafe, and will not normally do so absent a flaw in the oral directions which undermines the safety of the conviction. A complaint of a failure to give written directions standing on its own would not render a verdict unsafe in the absence of some additional feature of sufficient seriousness leading to that result. The Court followed what was said by Green LJ in *R v N* [2019] EWCA Crim 2280; [2020] 4 WLR 64 at paragraph 19:

> "19. …counsel argues that the failure in and of itself on the part of the judge to give written directions to the jury renders the verdict unsafe in a case such as this. In circumstances in which an oral direction only is provided a conviction will, in normal circumstances, be quashed because that oral direction was wrong or materially confusing, etc. It will not be because of the mere omission of written directions. It might be that the exercise of crafting written directions would have led to the errors being avoided but the errors remain those embedded in the oral directions and not in the mere fact that no written equivalent was given. We do not however rule out the possibility that, exceptionally, a direction might be so complex that absent an exposition in writing a jury would be at a high risk of being confused and misled in a material manner."

73. In the light of our conclusion that the judge's oral directions were seriously flawed, we do not need to rest our decision on whether this was one of the exceptional cases Green LJ had in mind where a conviction would be rendered unsafe by virtue of the absence of written directions alone. We would observe, however, that if it was not such a case it was at least very close to one. It involved complex legal and factual issues. The directions of law were not, as the judge described them, "classic straightforward directions". In a number of respects, including those which we have addressed above, the concepts involved in the legal directions were difficult enough even for trained lawyers; we very much doubt whether all lay people could safely be assumed to be able to understand, absorb, retain and apply them without the assistance of having them in writing.

74. It is apparent from the transcripts we have seen that the judge was having to manage a heavy workload in relation to other cases during the course of the trial. We understand, and are sympathetic to, the pressures which the demands of the system place on Crown Court judges and the extent to which such demands have increased in the exceptional circumstances of the recent pandemic. This was not a case, however, in which there

was any urgency in concluding the trial by reason of the restricted availability of jurors or for any other reason. The trial had not overrun its estimate. It was not pressures of time which led the judge to decline to provide written directions. On the contrary, the judge indicated that she was not doing so because it was her practice not to do so. Such a practice is outdated, and is no longer acceptable in a case like this.

75. In conclusion, we would pay tribute to the measured, courteous and persistent way in which Ms Elliott sought to persuade the judge to adopt what would undoubtedly have been the right course in this case. The absence of an opportunity to consider the directions of law in writing, either in advance or when being given orally to the jury, was a very real hindrance to the defence in the fair conduct of the trial, quite apart from its adverse impact on the judge's function to give clear and correct directions of law and the jury's ability to perform their function of correctly applying the law.